

December 11, 1991

Mr. Terry Turner
Halawa Correctional Facility
99-902 Moanalua Road
Aiea, Hawaii 96701

Dear Mr. Turner:

Re: Inmate Access to Newspaper Clippings Binder

This is in response to your letters dated July 16, 1991 and July 31, 1991 to the Office of Information Practices ("OIP"). You have requested an opinion from the OIP concerning your right to inspect and copy the binder of newspaper clippings maintained at the Halawa Correctional Facility's Recreational Library, and your right to receive personal copies of newspapers free of charge.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the binder of newspaper clippings ("binder") housed in the Halawa Correctional Facility's Recreational Library must be made available for inspection and copying by inmates.

II. Whether, under the UIPA, the Department of Public Safety ("PSD") must maintain the binder in the Law Library rather than in the Recreational Library of the Halawa Correctional Facility.

III. Whether, under the UIPA, the PSD is required to provide you with your own personal copies of newspapers free of charge.

BRIEF ANSWER

I. Yes. Because the binder is already made available for inmates to review in the Recreational Library, and because information in the binder is not protected from disclosure by the UIPA, the binder should be made available for inspection and copying by inmates. However, your right to receive copies of the binder will depend upon your ability to pay for the copying fees. The issue of copying fees and the related issue of whether you should be allowed to receive copies free of charge due to your in forma pauperis standing is outside of the OIP's jurisdiction.

II. The UIPA does not govern the answer to this question. Accordingly, the OIP has no authority to advise you whether the PSD must maintain the binder in one location or another.

III. No. Current PSD policies allow you to purchase your own newspapers or read the Recreational Library's circulation copies. The UIPA does not require the PSD to provide you with your own personal copies of newspapers free of charge, and therefore, the OIP is not able to assist you in this matter.

FACTS

The librarian for the Law Library of the Halawa Correctional Facility ("Law Library") has compiled a "clip file" by clipping newspaper articles concerning the Halawa Correctional Facility and placing these clippings into a binder.

Originally intended for staff use only, the binder was later made available in the Law Library for inmates as well as staff to read. Presently, the binder is being kept in the Halawa Correctional Facility's Recreational Library ("Recreational Library") for inmates to review.

Current Department of Public Safety ("PSD") policies allow inmates to obtain copies of materials in the Law Library. Inmates requesting copies of Law Library materials are charged copying fees which are debited from inmates' accounts. An exception is made for those inmates who are in forma pauperis and who are involved in litigation. These inmates are permitted to receive copies of materials that pertain to their court cases, without paying applicable copy charges.

Because PSD policies do not permit inmates to obtain copies of materials housed in the Recreational Library, your request for copies of the clippings in the binder has been denied by the PSD. You have written to the OIP for assistance in obtaining copies of the binder's clippings. In your letter, you also ask that the PSD be directed to place the binder in the Law Library

rather than in the Recreational Library. Finally, you also object to the fact the PSD does not provide you with your own personal copies of newspapers free of charge.

DISCUSSION

The UIPA generally provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1990). Thus, section 92F-11(b), Hawaii Revised Statutes, clearly states that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours."¹ Haw. Rev. Stat. . 92F-11(b) (Supp. 1990) (emphasis added). See also OIP Op. Ltr. No. 90-34 (Dec. 10, 1990) (inmates in state correctional facilities are "persons" within the meaning of section 92F-11(b), Hawaii Revised Statutes).

Although the newspaper articles compiled in the binder did not originate from the PSD, the compilation itself is a government record because it constitutes "information maintained by an agency in written . . . form." Haw. Rev. Stat. . 92F-3 (Supp. 1990). The term "maintain" was examined closely in OIP Opinion Letter No. 91-5 (April 15, 1991) when this office was asked to render an opinion regarding the disclosure of information concerning jurors grading the Architect Registration Examination ("Examination"). Although this written Examination was administered to applicants by the Department of Commerce and Consumer Affairs' Board of Professional Engineers, Architects, Surveyors, and Landscape Architects ("Board"), as one of the requirements for a professional architect's license in the State of Hawaii, the Examination was created by the National Council of Architectural Registration Boards ("NCARB").

Pursuant to the contract between the Board and the NCARB, the NCARB provided the Examination and its answers to the Board.

¹This is not to indicate that persons may have unrestricted access to all government records. Future OIP rules will enable an agency "to protect its records from theft, loss, defacement, alteration, or deterioration and to prevent manifestly excessive interference with the discharge of its other lawful responsibilities and functions." Haw. Rev. Stat. . 92F-11(e) (Supp. 1990).

However, under the contract, the scoring of the Examination was the responsibility of the NCARB. Thus, the jurors grading the Examination were selected by the NCARB and records containing information concerning the jurors were kept by the NCARB.

In its discussion concerning whether the Board "maintained" the requested information, OIP Opinion Letter No. 91-5 examined the definition of "maintain" in the Uniform Information Practices Code ("Model Code"), upon which the Legislature modeled the UIPA. Section 1-105(6) of the Model Code defines "maintain" as "hold, possess, preserve, retain, store, or administratively control." Further, the Model Code commentary to section 1-105(6) states that "[m]aintain is defined in Section 1-105(6) to sweep as broadly as possible. It includes information possessed or controlled in any way by an agency." Because the juror information was possessed by the NCARB rather than the Board, the opinion concluded that the Board did not "maintain" the information. Furthermore, although the NCARB possessed the juror information, it did not qualify under the UIPA definition of "agency." Accordingly, OIP Opinion Letter No. 91-5 concluded that the requested information concerning the jurors was not subject to the provisions of the UIPA.

The United States Supreme Court, in U.S. Dep't of Justice v. Tax Analysts, 109 S. Ct. 2841 (1989), addressed the issue concerning whether records created by a non-agency, but possessed by an agency, become agency records subject to the federal Freedom of Information Act ("FOIA"). In the Tax Analysts case, the Department of Justice, Tax Division ("DOJ") argued that it should not be required to provide Tax Analysts with DOJ file copies of District Court tax decisions because the decisions are not agency records created by the DOJ.

Rejecting this argument, the Court found that two requirements must be satisfied for materials to qualify as agency records under the FOIA. "First, an agency must 'either create or obtain' the requested materials 'as a prerequisite to its becoming an agency record within the meaning of the FOIA.'" Tax Analysts at 2847, quoting Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 182, 100 S. Ct. 960, 985 (1980). "Second, the agency must be in control of the requested materials at the time the FOIA request is made." Tax Analysts at 2847-8. Consequently, because the DOJ had obtained the District Court decisions and had control over the documents

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at the time the FOIA request was made, the court decisions were "agency records" subject to inspection and copying under the FOIA.

In addition, the Court rejected the DOJ's argument that it should not be required to provide copies of documents that are already publicly available elsewhere. Despite the fact that the requested documents in Tax Analysts were available from the District Courts, the documents were also DOJ "agency records" and, thus, the Court ruled that the DOJ must provide copies of these documents in response to the FOIA request.

Relying upon OIP Opinion Letter No. 91-5's discussion of the definition of "maintain," as well as the Tax Analysts case, we conclude that the binder of newspaper clippings at issue is an agency record "maintained" by the PSD.

Additionally, there is no genuine issue that the binder is not protected from disclosure under section 92F-13, Hawaii Revised Statutes, because the PSD has routinely permitted inmates to inspect clippings in the binder. We have reviewed the exceptions to disclosure listed in section 92F-13, Hawaii Revised Statutes, and we conclude that none of the UIPA exceptions are applicable to the binder.

Because the binder is located at the Recreational Library, and because current PSD policies only permit inmates to copy Law Library materials, the PSD has denied requests to copy newspaper clippings in the binder. Under the UIPA, any government record that may be inspected must also be made available for copying upon request by any person. Specifically, section 92F-11, Hawaii Revised Statutes, provides in pertinent part:

(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours.

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(d) Each agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts.

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Haw. Rev. Stat. . 92F-11 (b), (d) (Supp. 1990) (emphases added).

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Because information in the binder is a government record which is not protected from disclosure, it is our opinion that under section 92F-11(b) and (d), Hawaii Revised Statutes, the PSD must make the binder available for copying notwithstanding the fact that the binder is housed in the Recreational Library, rather than the Law Library. However, the PSD is authorized to charge copying fees, and you may be required to comply with the payment of these fees before obtaining copies of the clippings in the binder. We understand that you are proceeding in forma pauperis in your court cases and that you have been receiving copies of certain materials free of charge. The UIPA does not govern the fees that may be charged by agencies for "copies" of government records. Therefore, any determination by the PSD concerning whether you are entitled to receive free copies is a matter outside the scope of the OIP's jurisdiction. Accordingly, the OIP does not have jurisdiction to opine on this question.

With regard to your question concerning whether the PSD's binder must be located in the Recreational Library, the UIPA also does not govern this question. Therefore, we are unable to assist you in this matter.

With respect to your statement that you are not able to obtain your own personal copies of newspapers, it is our understanding that inmates at the Halawa Correctional Facility are allowed to purchase their own copies of newspapers or to read the circulation copies available at the Recreational Library. The PSD is not required, under the UIPA, to provide you with your own personal copies of newspapers free of charge. Thus, the OIP is also unable to assist you in this matter.

CONCLUSION

We conclude that under the UIPA, the newspaper clippings binder must be made available for both inspection and copying by inmates. However, the right to copy the binder is subject to the payment of copying fees. The OIP lacks jurisdiction in the area of copying fees, and cannot assist you in obtaining free copies of the clippings in the binder.

Furthermore, the OIP does not have the authority to opine concerning whether the binder must be kept in the Law Library rather than the Recreational Library. The UIPA only requires that the binder be made available for inspection and copying, and does not compel the PSD to keep it in a specific location.

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Finally, PSD policies allow you to purchase your own personal copies of newspapers or read the circulation copies of newspapers available at the Recreational Library. The UIPA does not require the PSD to provide you with free copies of newspapers and, thus, the OIP cannot assist you in this matter.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc

c: George W. Sumner, Director
Department of Public Safety

Eric Penarosa, Deputy Director of Corrections
Department of Public Safety

Deanna Espinas, Library Services Officer
Department of Public Safety

Janice Nielson, Librarian
Halawa Correctional Facility

Jack Campbell, Deputy Attorney General
Social Services Division